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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1399

ERNEST L. MONTANYE, *et al.*,

Petitioners,

v.

RODNEY R. HAYMES,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Respondent Rodney R. Haymes, a former prisoner in the New York State prison system,[*] hereby opposes the petition for a writ of certiorari filed by petitioners Ernest Montanye and Harold Smith to review a judgment of the United

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[1] The respondent was granted parole and released on April 13, 1976, and presently remains on parole. Although his equitable claims are moot, he also sought monetary damages which survive.

States Court of Appeals for the Second Circuit, *Haymes v. Montanye*, 547 F.2d 188 (2nd Cir. 1976), which judgment was entered after remand of this case from this Court's judgment in *Montanye v. Haymes*, 427 U.S. 236 (1976).

QUESTION PRESENTED

Should this Court review the question of whether a claim under 42 U.S.C. § 1983 is stated by a prisoner who alleges he was punished for exercising his First Amendment right to petition for redress of grievances and his federally protected right to assist other prisoners to prepare habeas corpus petitions, when the court below merely reversed dismissal of a *pro se* complaint and remanded the case for an evidentiary hearing on disputed facts?

STATEMENT OF THE CASE

This Court previously summarized the events leading up to this litigation:

> "On June 7, 1972, respondent Haymes was removed from his assignment as inmate clerk in the law library at the Attica Correctional Facility in the State of New York. That afternoon Haymes was observed circulating among other inmates a document prepared by him and at the time signed by 82 other prisoners. Among other things, each signatory claimed that he had been deprived of legal asistance as a result of the removal of Haymes and another inmate from the prison law library. The document, which was addressed to a federal judge but sought no relief, was seized and held by prison authorities.

> On June 8, Haymes was advised that he would be transferred to Clinton Correctional Facility, which, like Attica, was a maximum security institution. The transfer was effected the next day . . . . On August 3, Haymes filed a petition with the United States District Court which was construed by the judge to be an application under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 seeking relief against petitioner Montanye, the then superintendent at Attica. The petition complained that the seizure and retention of the document, despite requests for its return, not only violated Administrative Bulletin No. 20, which allegedly made any communication with a court privileged and confidential, but also infringed Haymes' constitutionally guaranteed right to petition the court for redress of grievances. It further asserted that Haymes' removal to Clinton was to prevent him from pursuing his remedies and also in reprisal for his having rendered legal assistance to various prisoners, as well as having, along with others, sought to petition the court for redress." 427 U.S. 236, 237-238 (footnote omitted).

The district court dismissed the complaint, although it considered three affidavits from the petitioners, and an affidavit of the respondent in rebuttal. The court of appeals, in its first opinion, reversed, holding that at least two genuine issues of material fact were present in the case. *Haymes v. Montanye*, 505 F.2d 977, 979 (1974).

Because the court of appeals concluded that summary judgment (as they characterized the district court's action) had been improper on the factual issues relating to Haymes' due process claim, it found it unnecessary to consider his

claim that his transfer had infringed upon constitutionally protected activity. *Id.* at 982.

This Court reversed the court of appeals' first decision *because it found the facts as alleged by Haymes presented no due process question:* ". . . the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight. The Clause does not require hearings in connection with transfers whether or not they are the result of the inmate's misbehavior or may be labeled as disciplinary or punitive." 427 U.S. at 242. Thus the judgment of the court of appeals was "reversed and remanded . . . for further proceedings consistent with this opinion." *Id.* at 244.

This Court's opinion did not directly address itself to the question of whether or not a trial should be held in the district court on Haymes' claim that his transfer was in retribution for engaging in constitutionally protected activity. The majority opinion did say that: "As long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him *and are not otherwise violative of the Constitution,* the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Id.* at 242. (Emphasis added.)

The dissenting opinion stated that the claim by Haymes that he was engaging in constitutionally protected activity remained open:

> "I am persuaded, however, that the allegations of his complaint are sufficient to require a trial of his claim that the transfer was made in retribution for his exercise of protected rights. On this claim, the reason for the defendants' action is critical and the procedure followed is almost irrelevant. I do not understand the Court to disagree with this analysis, and assume that the Court of Appeals, consistently with this Court's mandate, may direct the District Court to conduct a trial." *Id.* at 244 (Stevens, J., dissenting).

On remand, the court of appeals considered ". . . those issues which it was not necessary to reach . . ." in its previous decision and held that there ". . . are genuine issues of material fact as to whether Haymes' transfer violated either his First Amendment rights or his federally protected right to help prisoners prepare habeas corpus petitions." 547 F.2d at 189. The court of appeals remanded the case to the district court for a hearing on those factual questions and it is that decision which the petitioners now ask this Court to review.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

The issues presented in the petition are insufficient to warrant plenary review when judged by the standards established in Supreme Court Rule 19. There is no conflict with a decision of another court of appeals or of this Court; there is no unsettled question of federal law which should be decided by this Court; there is no important state question decided in conflict with applicable state law.

The court of appeals decided very little. They merely followed the principle enunciated by this Court in *Haines v. Kerner,* 404 U.S. 519 (1971) (per curiam) in interpreting the respondent's *pro se* complaint and affidavit liberally, and concluded that there were genuine issues of material fact concerning substantial constitutional claims.

They found that the complaint and affidavit stated a cause of action on the claim that state officials had taken certain punitive action against the respondent Haymes in reprisal for exercising his First Amendment right to petition for redress of grievances and his federally protected right to help prisoners prepare habeas corpus petitions.

The petitioners claim that this Court reached and disposed of those issues in its earlier decision, *Montanye v. Haymes, supra,*[2] and that the court of appeals reached the same judgment that it had in its first decision. It is submitted that they err on both counts. It is clear that the court of appeals did not reach the same judgment on the same issues in both decisions for they state in their decision, now sought to be reviewed, that "We now deal with those issues which it was not necessary to reach in our previous decision." 547 F.2d at 189.

This Court in its earlier decision was concerned with the issue of whether a protected liberty interest flowed directly from the Due Process Clause.[3] The majority indicated that it was not reaching the issue of constitutionally protected activity when it said that "As long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him

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[2] The petitioners did not make this claim in the court of appeals on remand. They only argued that Haymes had no standing to raise these issues because, although he had prepared and was circulating the petition and the substance of the petition concerned his removal from the prison law library, he had not himself signed the petition at the time of its seizure.

[3] The respondent's brief in that case only mentioned the issue of constitutionally protected activity in a footnote. (Respondent's Brief, pp. 20-21, n. 20 in Docket No. 74-520).

and are not otherwise violative of the Constitution, the Due Process Clause does not itself subject an inmate's treatment by prison authorities to judicial oversight." 427 U.S. at 242 (emphasis added).

The dissenting opinion in *Montanye, supra,* made it quite clear that it understood that this Court agreed with its analysis that the constitutionally protected activity issue had not been reached and that the court of appeals should direct the district court to conduct a trial on this issue, 427 U.S. at 244, which is precisely what the court of appeals did.

Finally, this Court's action in the companion case, *Meachum v. Fano,* 427 U.S. 215 (1976), undercuts the petitioners' theory on their "prior disposition" claim. In *Meachum,* where there is no claim that the prisoners might have engaged in protected activity, this Court merely reversed the court of appeals, while in *Montanye, supra,* this Court reversed the court of appeals *and remanded for further proceedings.* 427 U.S. at 244.

The court below was certainly not breaking new ground, as suggested by the petitioners, when it held that Haymes should have the opportunity to prove his allegation that his conduct in circulating the confiscated document was an attempt to petition for redress of grievances and therefore was protected by the First Amendment. See *Procunier v. Martinez,* 416 U.S. 396 (1974).

This Court has also made it clear that ". . . it is fundamental that access of prisoners to the court for the purpose of presenting their complaints may not be denied or obstructed." *Johnson v. Avery,* 393 U.S. 483, 485 (1969). The Court has just recently reaffirmed ". . . that prisoners have a constitutional right of access to the courts." *Bounds v. Smith,* ___ U.S. ___, No. 75-915 (April 27, 1977). The

Court in *Bounds* again made it clear in discussing *Johnson v. Avery, supra,* and *Younger v. Gilmore,* 404 U.S. 15 (1971), that a state may not by regulation interfere with a prisoner's right of access to the courts. Furthermore, the Court in *Bounds* stated that states were required ". . . to shoulder affirmative obligations to assure all prisoners meaningful access to the courts," slip opinion at p. 8, and that their main concern was ". . . protecting the ability of an inmate to prepare a petition or complaint," slip opinion at p. 12, n. 17. The petitioners attempt to obfuscate the issues with a discussion of due process considerations which are no longer in the case, and thereby avoid the constitutional limits placed on their actions by *Johnson, Younger* and *Bounds.*

Finally, the petitioners appear to argue that there are certain governmental actions which, despite their motivation and their consequences, can never be subjected to judicial scrutiny. They argue, presumably, that they could punitively transfer a prisoner because he was black and the Warden did not like blacks, or because he wrote a letter to his lawyer asking him to institute suit against prison officials. This Court made it clear in *Johnson v. Avery, supra,* that a state could not punish a prisoner for assisting other prisoners with habeas corpus petitions. See also *Bounds v. Smith, supra* and *Procunier v. Martinez, supra* at 421 (state regulation invalidated because it impermissibly burdened the right of access).

Indeed, the Solicitor General conceded in *Montanye v. Haymes, supra,* that certain state action would be improper, irrespective of due process considerations, if the reason for the state action had to do with punishment for the exercise of constitutionally protected rights. (Brief for United States *Amicus Curiae,* 25, n. 12, Docket No. 74-520).

CONCLUSION

For the foregoing reasons, the judgment of the court below was correct, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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